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No. 85-1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY and UNION PACIFIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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Respondents The Western Pacific Railroad Company ("Western Pacific") and Union Pacific Corporation ("Union Pacific") submit this supplemental brief pursuant to Rule 22.6 to inform the Court of a development which may conceivably affect the Court's decision on the petition for a writ of certiorari in this matter. See *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

1. Reason For A Supplemental Brief.

The petition for a writ of certiorari in this matter was filed on behalf of former Western Pacific shareholders who elected not to accept the $20 per share tender offer and merger price offered to all Western Pacific shareholders by Union Pacific and approved by the Interstate Commerce Commission as "fair and reasonable." Instead, Petitioners and those they represent sought appraisal rights pursuant to the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. They petition for a writ of certiorari from the Delaware Supreme Court's decision, based on *Schwabacher v. United States*, 334 U.S. 182 (1948), and 49 U.S.C. § 11341(a), that the ICC's approval of the $20 per share price necessarily preempted state law appraisal rights and precluded jurisdiction over the appraisal proceeding.

Following submission of Respondents' Brief In Opposition to the petition for a writ of certiorari herein, a Western Pacific Stockholders' Protective Committee ("SPC"), composed of former Western Pacific stockholders who did not tender their shares to Union Pacific but instead sought Delaware appraisal rights, filed with the ICC a Petition to Reopen for Entry of Supplemental Order pursuant to 49 U.S.C. § 11351. That petition asked the ICC to reopen the proceeding in which it had approved Union Pacific's merger with Western Pacific, as well as Union Pacific's offer of $20 per share—the very same proceeding that had formed the basis for the Delaware Supreme Court's determination of lack of state law appraisal proceeding jurisdiction—and to redetermine the fair value of Western Pacific at the time of its merger into a subsidiary of Union Pacific in May, 1983.

In support of the petition to reopen, SPC made three arguments to the ICC that are identical to arguments made in

support of the petition for a writ of certiorari in this action.[1] In a decision, dated January 28, 1987, the ICC denied the petition to reopen and responded to these arguments. *Union Pacific Corp., Pacific Rail Sys., Inc., and Union Pacific R.R. Co.-Control-The Western Pacific R.R. Co.*, Finance Docket No. 30,000 (Sub.No. 1) (I.C.C. Jan. 28, 1987). The ICC's response reaffirms the fairness of the $20 per share merger price, demonstrates the accuracy of the statements made in Respondents' Brief In Opposition herein and further supports the conclusion that the petition for a writ of certiorari in this matter should be denied.

2. The ICC Decision On The Petition To Reopen.

Thus, the petition for a writ of certiorari herein seeks to overturn the Delaware Supreme Court's denial of appraisal rights by accusing Union Pacific and Western Pacific of making misrepresentations to the Western Pacific shareholders, the ICC, and the United States Court of Appeals for the District of Columbia Circuit concerning the availability of Delaware appraisal rights to dissenting Western Pacific shareholders. Pet. at 3, 25-27. In response to the same argument in SPC's petition to reopen, the ICC stated:

> "We reject Petitioners' contention that they are entitled to an appraisal by the Commission merely because UPC 'promised' them an appraisal and the Delaware courts found that they lacked jurisdiction to conduct one. While UPC stated that it would pay the appraised price if an appraisal were conducted (Tender offer, page 9), UPC and WP also indicated quite clearly, in both the tender offer and proxy statement, that the existence of a State court appraisal remedy was in some doubt. We do not think stockholders were or should have been misled by these

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1 As an initial matter, the arguments made in support of the petition for a writ of certiorari are not pertinent to the issue of federal preemption of state law appraisal jurisdiction presented by the petition. In any event, as demonstrated herein and in Respondents' Brief In Opposition, the arguments have no merit as a factual or legal matter.

> statements. If they could read about and understand the possibility of an appraisal, they could also see the questions about its availability. Nor do we think UPC was obligated to accede to a State court appraisal proceeding, which, if concluded, would have been a nullity . . . ."

ICC Decision at 3.

The petition for a writ of certiorari herein also relies for support on the assertion that the ICC's approval of the Union Pacific-Western Pacific merger and the $20 per share price to Western Pacific stockholders was premised on the ICC's belief that Delaware appraisal rights would be available to dissenting Western Pacific shareholders. Pet. at 6, 21, 24. The ICC, in denying SPC's petition to reopen, expressly stated that neither it "nor the Court of Appeals relied upon the possibility of an appraisal as the basis for, or even an element in, their approval of the terms of the transaction." ICC Decision at 3. The ICC went on to state:

> "Contrary to SPC's contention, we did not leave the determination of the amount to be received by any WP shareholder (assenting or not) to the Delaware courts, but determined 'the full economic equivalent of what they [all WP shareholders] presently hold.' *Schwabacher*, 334 U.S. at 199. *Schwabacher* has been satisfied; the issue is *res judicata*."

ICC Decision at 3-4 (footnote omitted). In an accompanying footnote, the ICC once again affirmed ". . . we did not rely on the existence of appraisal rights in our decision. . . ." *Id.* at 4 n.6.

Thus, as discussed in full in Respondents' Brief In Opposition, and contrary to the claims made in support of the petition for a writ of certiorari, the ICC, in approving the Union Pacific-Western Pacific merger and the $20 per share offered to Western Pacific shareholders, expressly recognized its obligation under *Schwabacher v. United States*, 334 U.S. 182 (1948), to determine the fair value of Western Pacific stock and fulfilled that obligation without any anticipation of or mis-

understanding about the availability of a Delaware appraisal proceeding.

Finally the petition for a writ of certiorari claims that when the ICC approved the Union Pacific-Western Pacific merger and the $20 per share price offered to Western Pacific shareholders it was ignorant of the alleged value of certain Western Pacific landholdings. Pet. at 11-12. In response to the same claim by SPC in the petition to reopen, the ICC first noted its skepticism concerning the alleged hidden value of Western Pacific's landholdings:

> "SPC does not claim that anything occurred between January 1980 (when the $20 price was agreed upon) and 1983 to increase the value of the land, but that 'no one was aware of the value of WP's hidden assets' (WP's landholdings) until the 1983 Proxy Statement. We question the likelihood of this universal unfamiliarity with WP's assets, particularly on the part of the financial community, the WP Board of Directors (which accepted the UP offer of $20 per share after receiving the advice of an independent investment banking firm, Solomon Brothers) and Mr. Wheeler, who served as counsel to WP during 1978-79 Commission consideration of the sale of WP's assets (see n.5, *supra*)."

ICC Decision at 4 n.7. The ICC then went on to note the irrelevancy of the claim in any event because it had been made aware of the purported hidden land values in a previous petition to reopen and reconsider filed by Daniel A. Bruno, one of the petitioners seeking a writ of certiorari herein:

> ". . . we do not agree that this is the first time the Commission has been asked to value the compensation based on the so-called new evidence. In our June 16, 1983, decision referred to earlier, we declined to reopen and reconsider our valuation finding, as requested by a minority stockholder [Daniel A. Bruno] based on new evidence of land values found in the proxy statement. We stated in that decision, at page 2, that the land value allegations were similar to those made on the record and

> considered in our decision approving merger. We rely on that decision here, and note that the other evidence relied on by SPC is not enough, standing alone, to warrant reopening. This is bolstered by the fact that our conclusion as to fairness was based on the going concern value of WP, not liquidation value, which might give greater weight to the value of particular assets."

Id. at 4.

Moreover, in using "going concern value of WP" as a fairness standard, the ICC was using the same standard a Delaware appraisal court would have applied. *See, e.g., Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. Supr. 1950) ("The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, *viz.*, his proportionate interest in a going concern."); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. Supr. 1983). Thus, a Delaware appraisal proceeding would not only have been a "nullity," see ICC Decision at 3, it would be redundant.

CONCLUSION

As discussed in Respondents' Brief In Opposition, the petition for a writ of certiorari in this matter rests on erroneous claims concerning what the ICC did and knew in approving the Union Pacific-Western Pacific merger and the $20 per share price offered to Western Pacific shareholders as "fair and reasonable." As discussed above, the ICC's decision denying SPC's petition to reopen provides a response to these claims and effectively demonstrates that they are simply unfounded. For the reasons set forth above and in Respondents' Brief In Opposition, the petition for a writ of certiorari herein should be denied.

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